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In The
Supreme Court of the United States
October Term, 1991

ROBERT E. GIBSON,

Petitioner,

vs.

THE FLORIDA BAR, ET AL.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eleventh Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

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The purpose of this supplemental brief is to present to the Court the Florida Supreme Court decision in the case of *The Florida Bar Re: David P. Frankel*, Case No. 76,853 (June 13, 1991). A copy of the opinion is included in the Appendix to this brief.

In its initial brief The Florida Bar argued that advance reduction of dues was impracticable in Florida for two reasons. The first of those reasons was that The Florida Bar does not intentionally budget funds for non-chargeable expenditures. With the *Frankel* decision that reason now rests not only on practice, but on law.

In the *Frankel* decision, the Florida Supreme Court held that the Bar was restricted by its mandate from engaging in *any* lobbying activities, whether funded by compulsory dues or not, which did not meet stringent criteria. Issues are subject to Bar lobbying if they fall into the following categories:

- (1) Questions concerning the regulation and discipline of attorneys;
- (2) Matters relating to the improvement of the functioning of the courts, judicial efficacy, and efficiency;
- (3) Increasing the availability of legal services to society;
- (4) Regulation of attorneys' client trust accounts; and
- (5) The education, ethics, competence, integrity and regulation as a body, of the legal profession.

[App. 3] As to matters not falling within those specific categories, the Bar may lobby only when it meets the following three-pronged criteria:

- (1) That the issue be recognized as being of great public interest;
- (2) That lawyers are especially suited by their training and experience to evaluate and explain the issue; and
- (3) The subject matter affects the rights of those likely to come into contact with the judicial system.

[App. 4]

The Court analyzed this Court's opinion in *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), and concluded that the foregoing criteria, as applied, did not extend beyond the bounds of *Keller*. The Court noted that its purpose in adopting the criteria was to apply the *Abood*¹ rationale. In addition, the Court reaffirmed its earlier holding that any member of The Florida Bar has standing to challenge a position taken by the Bar before the Florida Supreme Court and that available relief includes both dues rebate and injunction.

In his amicus curiae brief Mr. Frankel cites eight specific legislative positions taken by The Florida Bar in 1990. Mr. Frankel challenged the same eight positions in his case before the Florida Supreme Court. The Court held all eight positions to be outside the scope of permissible lobbying activities by The Florida Bar, ordered a rebate of the appropriate portion of Mr. Frankel's dues, and enjoined the Bar from further lobbying with respect to such issues.

Advance reduction of dues serves no purpose in a state like Florida where the Bar is without authority to engage in political or ideological activities which are outside the scope of *Abood* and *Keller*. Since the Bar is prohibited from budgeting for non-chargeable activities, there is nothing to reduce in advance. Of course, the Bar's decision as to what is or is not chargeable is not infallible, but dissenters have effective means of challenging such decision either through the escrow/arbitration procedure or through direct petition to the Supreme Court.

¹ *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The *Frankel* decision also has a significant impact upon the petitioner's challenge to The Florida Bar's objection procedure. That procedure does not require that a dissenter indicate his or her position on a given issue, only that he or she designate the issues alleged to be non-chargeable. Petitioners insist they can only be required to make a general objection to all non-chargeable uses. Such a procedure might be workable in jurisdictions which intentionally budget for non-chargeable purposes. Since Florida is prohibited from budgeting for non-chargeable purposes, the only reason for the objection procedure is to indicate that a dissenter disputes the Bar's conclusion that a given issue is chargeable. Thus, the type of general objection which petitioners would like to make would be meaningless.

Respectfully submitted

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APPENDIX
SUPREME COURT OF FLORIDA

No. 76,853

THE FLORIDA BAR

Re DAVID P. FRANKEL

[June 13, 1991]

PER CURIAM.

David P. Frankel (Frankel), a member in good standing of The Florida Bar, petitions this Court to enjoin The Florida Bar, both *pendente lite* and thereafter, from engaging in certain allegedly impermissible legislative lobbying positions taken by the board of governors. In addition, Frankel requests a pro rata refund of that portion of his mandatory dues applicable to the impermissible lobbying positions. As a creation of this Court, The Florida Bar is under our supervision and subject to our regulation.¹ We grant Frankel's requested injunction, although not *pendente lite*, and his requested dues refund.

¹ Any member of The Florida Bar in good standing may question the propriety of any legislative lobbying position taken by the board of governors by filing a timely petition with this Court. *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), *cert. denied*, 111 S.Ct. 371 (1990).

App. 2

The board of governors adopted the following lobbying positions and published them in *The Florida Bar News*:

6. Supports the recommendations of The Florida Bar Commission for Children relating to:
 - a. Expansion of the women, infants and children (WIC) program.
 - b. Extension of Medicaid coverage for pregnant women.
 - c. Full immunization of children.
 - d. Establishing children's services councils.
 - e. Family life and sex education/teen pregnancy prevention.
 - f. Increasing Aid to Families with Dependent Children.
 - g. Enhanced child-care funding and standards.
 - h. Creation of children's needs consensus estimating conference.
 - i. Establish family court divisions in each circuit.
 - j. Termination of parental rights/revision of Chapter 39, F.S.; cocaine-exposed infants.
 - k. Guardians Ad Litem - dissolution and custody.
 - l. Establish foster care review boards.
 - m. Eliminate select public disclosure exemptions in child abuse cases.
 - n. Development of juvenile offender rehabilitation and treatment programs.

App. 3

The Florida Bar News, Oct. 15, 1990, at 4, col. 2. In his petition, Frankel challenges lobbying positions 6.a. through 6.h. as being beyond the scope of permissible bar lobbying activities. He makes no claim as to the propriety of the other positions.

To determine the propriety of the contested bar lobbying positions, we turn to *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), *cert. denied*, 111 S.Ct. 371 (1990). There, we adopted the Judicial Council of Florida's² recommendation that the following areas clearly justify bar lobbying activities:

- (1) Questions concerning the regulation and discipline of attorneys;
- (2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;
- (3) increasing the availability of legal services to society;
- (4) regulation of attorneys' client trust accounts; and
- (5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

² In *The Florida Bar re Schwarz*, 526 So.2d 56 (Fla. 1988), our first *Schwarz* decision, we declined to decide whether any existing specific lobbying activity of The Florida Bar was improper. Rather, we referred the matter to the Judicial Council of Florida for its comments and recommendations. We adopted the council's recommendations as guidelines for determining permissible bar lobbying activity in our second *Schwarz* decision. *Schwarz*, 552 So.2d at 1095.

552 So.2d at 1095. We also adopted the council's recommendation that the following additional criteria be used to determine permissible bar lobbying activities when the legislation falls outside of the above specifically identified areas:

(1) That the issue be recognized as being of great public interest;

(2) that lawyers are especially suited by their training and experience to evaluate and explain the issue; and

(3) the subject matter affects the rights of those likely to come into contact with the judicial system.

Id.

The Florida Bar carries the burden of proof in establishing the propriety of its lobbying activities. *Schwarz; Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986); see R. Regulating Fla. Bar 2-9.3. We fail to see how the contested lobbying positions fall within the five areas which clearly justify bar lobbying activities. The bar contends that its involvement in children's matters clearly justifies advocacy of the contested positions due to their relationship to the ethics and integrity of the legal profession. Any such interpretation of the fifth guideline, however, is strained at best, and we reject the bar's analysis. Thus, we must examine the propriety of the contested lobbying positions under the three additional criteria set forth in *Schwarz*.

Before analyzing the propriety of the contested bar lobbying positions under the three additional criteria of *Schwarz*, we must first address Frankel's claim that, in

light of *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), the additional criteria violate the first and fourteenth amendment rights of dissenting bar members to be free from compelled speech and association. Because we find the additional criteria set forth in *Schwarz* to be consistent with the pronouncement of the Court in *Keller*, we reject Frankel's argument

Relying on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and *Ellis v. Brotherhood of Railway, Airline, & Steamship Clerks*, 466 U.S. 435 (1984), *Keller* held that a compulsory state bar association may constitutionally fund with mandatory dues only those activities "germane" to its purpose, i.e., activities necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services. This Court in *Schwarz* adopted guidelines to define those activities "germane" to the purpose of The Florida Bar, but, in contrast to *Keller*, delineated that purpose as to improve the administration of justice and advance the science of jurisprudence. See *In re Amendment to Integration Rule*, 439 So.2d 213 (Fla. 1983). We recognize that *Keller* reversed the California Supreme Court's decision in *Keller v. State Bar of California*, 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal.Rptr. 542 (1989), wherein it held that the state bar association could permissibly lobby on activities "germane" to the identical purpose defined in *Schwarz*. Upon first glance that decision may appear to have an impact on *Schwarz*. We find the California Supreme Court's decision, however, distinguishable from *Schwarz*.

To begin with, the California Supreme Court analogized its state bar association to a governmental agency and concluded that the first amendment restraints placed

on the expenditure of compulsory union dues, as set forth in *Abood*, were inapplicable. In *Keller* the United States Supreme Court rejected this analogy and based its decision in part upon *Abood*. This Court likewise has adopted *Abood*'s rationale and applied it in determining permissible lobbying activities of The Florida Bar. See *In re Amendment to Integration Rule; Schwarz*. We adopted the guidelines in *Schwarz*, to define the bar's purpose of improving the administration of justice and advancing the science of jurisprudence, in keeping with *Abood*.

In addition, we do not find a measurable difference between allowing bar lobbying activities for the purpose of regulating the legal profession or improving the quality of legal services and allowing lobbying activities for the purpose of improving the administration of justice or advancing the science of jurisprudence as defined in *Schwarz*. This conclusion is consistent with the United States Supreme Court. *Keller*, 110 S.Ct. at 2236 ("Simply putting this language alongside our previous discussion of the extent to which the activities of the State Bar may be financed from compulsory dues might suggest that there is little difference between the two."). *Keller* only found fault with the California Supreme Court's broad definition of the latter terms as evidenced by the activities which it found to be permissible lobbying activities, essentially all proposed legislation. On the other hand, in *Schwarz* we expressly stated that our definition of those purposes was not as broad as that given by the California Supreme Court and adopted guidelines to limit bar lobbying activities accordingly. *Schwarz*, 552 So.2d at 1096. Thus, after a careful analysis of *Keller*, we conclude that it does not require us to revisit the adoption of the

additional criteria in *Schwarz*, as they are consistent with *Keller*'s holding.

We now return to our analysis of the propriety of the contested lobbying positions under the three additional criteria of *Schwarz*. With regard to the first criterion, neither party disputes that children's issues are of great public interest, and we agree. Whether the contested lobbying positions satisfy the second criterion, i.e., that lawyers are especially suited by their training and experience to evaluate and explain the issue, is more problematical. The bar argues that its involvement in children's issues – evidenced by a special issue of The Florida Bar Journal solely devoted to children's topics; The Florida Bar Commission for Children (composed of lawyers, physicians, community leaders, legislators, and business executives) which for two years examined children's issues, societal problems, and the role of lawyers in contributing to the solution of these problems and recommended advocacy of the legislative positions at issue in the instant case; and the bar's moral obligation to Florida's children – verifies the suitability by training and experience within the legal profession to evaluate and explain the contested lobbying positions.

Although we commend The Florida Bar for its involvement with children's issues and find the positions certainly laudable, the bar has failed to prove that advocacy of the contested lobbying positions satisfy the second criterion. The merit of the position or the unanimity in its support is not the standard by which to determine the propriety of bar lobbying activities on that position.³

³ The Florida Bar, in its response to Frankel's petition, points out that only nine of 45,156 bar members objected to the specific lobbying positions at issue in the case at bar.

The bar has no specialized expertise regarding the subjects of expansion of the women, infants, and children program; extension of Medicaid coverage for pregnant women; full immunization for children; establishing children's services councils; family life and sex education/teen pregnancy; increasing aid to families with dependent children; enhanced child-care funding and standards; or creation of a children's needs consensus estimating conference. Nor has the bar obtained such expertise through publication of a special Journal issue or by establishing committees to study the area. Because the bar's lobbying positions 6.a. through 6.h. do not fall within the *Schwarz* guidelines, we find them to be outside the scope of permissible bar lobbying activities.⁴

We next address Frankel's claim that The Florida Bar must recognize its members' general objections to the use of their compulsory dues to fund legislative lobbying activities. Frankel claims that the bar's objection procedure, which requires objections on an issue-by-issue basis, forces dissenters to reveal their own beliefs and political positions in violation of *Abood*. We disagree.

Initially, we note that Frankel's general objection, which he claims is sufficient under *Abood*, merely states that "I hereby demand that no portion of my compulsory dues be used directly or indirectly to fund or support any legislative lobbying or amicus filings by or on behalf of The Florida Bar." Such an objection is insufficient under

⁴ Because The Florida Bar's lobbying positions fail to satisfy the second additional criterion of *Schwarz*, we need not address whether its positions satisfy the third additional criterion.

Abood because it is directed against all lobbying activities instead of only those activities which fall beyond the scope of permissible bar lobbying activities.

Moreover, the bar's objection procedure has been upheld in *Gibson v. The Florida Bar*, 906 F.2d 624, 632 (11th Cir. 1990), *cert. granted*, 111 S.Ct. 1305 (1991), which addressed this issue and stated:

As the Supreme Court has stated, the dissenter "has the burden of raising an objection." *Chicago Teachers [Union v. Hudson]*, 475 U.S. at 306, 106 S.Ct. at 1075 [1986] (citing *Abood*, 431 U.S. at 239-40 & n. 40, 97 S.Ct. at 1801-02 & n. 40). This burden "is simply the obligation to make his objection known." *Id.* at 306 n. 16, 106 S.Ct. at 1075 n. 16. The affirmative objection requirement here is within the scope of this obligation. It merely requires the objector to inform the Bar that he objects to the Bar's use of compulsory dues to support a given legislative policy. Beyond that, the objector need not provide any further information concerning the motivation for his objection or his own position concerning the legislative policy at issue.

We agree with the rationale of *Gibson*. Dissenters only need to object on the basis that the bar's announced lobbying position is outside the scope of its permissible lobbying activities. The procedure does not require them to reveal their own ideological positions.

Nor is The Florida Bar's objection procedure overly burdensome on the dissenting bar member, another concern expressed in *Abood*. The board of governors is required to publish its lobbying positions in the issue of The Florida Bar News immediately following the meeting

at which it adopts those positions. R. Regulating Fla. Bar 2-9.3(b). Bar members need only read the lobbying positions adopted by the board of governors in The Florida Bar News and, if they believe that the positions are outside the *Schwarz* guidelines, submit a written objection.

Lastly, there remains the question of determining the appropriate remedy under the circumstances of this case. Certainly, Frankel is entitled to a refund of his bar dues amounting to a proportionate share of the amount spent on the contested lobbying activities plus interest at the statutory rate. *See Gibson*, 906 F.2d 624; R. Regulating Fla. Bar 2-9.3. However, Frankel additionally petitions this Court to enjoin the bar, both pendente lite and thereafter, from lobbying on these issues. We grant the injunction but not pendente lite.⁵

This Court has yet to address whether a dissenting bar member may enjoin the bar from lobbying on positions outside the guidelines set forth in *Schwarz*. And the Supreme Court expressly refused to consider whether a dissenting bar member could enjoin the bar from lobbying on activities not germane to the bar's purpose in

⁵ Pendente lite is defined as "[p]ending the lawsuit; during the actual progress of a suit; during litigation. Matters 'pendente lite' are contingent on the outcome of litigation." *Blacks' Law Dictionary* 1134 (6th ed. 1990). Because The Florida Bar indicated its intent to continue to lobby on the children's issues Frankel contested, Frankel seeks to enjoin the bar from lobbying on those positions during the pendency of these proceedings. We find that Frankel has failed to make the requisite showing to obtain the injunction pendente lite.

Keller.⁶ *Keller*, however, analogized a mandatory state bar association to a compulsory union in reaching its decision. Within the context of a union-shop agreement, the Court previously has held that an injunction prohibiting a union from expending mandatory dues for political purposes would be inappropriate because nondissenting union members have an interest in stating their views "without being silenced by the dissenters." *International Association of Machinists v. Street*, 367 U.S. 740, 773 (1961); *see Aboud*.

We find that the concern expressed in *Street* is inapplicable with regard to The Florida Bar. An injunction prohibiting the bar from lobbying on a particular issue would not silence the voices of nondissenting members. The bar has many volunteer sections and political action committees through which bar members may assert their views. *See In re Amendment to Integration Rule; Schwarz*, (McDonald, J. dissenting). Indeed, these volunteer sections and committees are the appropriate vehicles for lobbying on issues that do not fall within the *Schwarz* guidelines.

Furthermore, The Florida Bar is a creation of this Court and subject to its supervision. In *Schwarz* we delineated guidelines by which to determine permissible bar lobbying activities. If a lobbying position does not fall within the guidelines set forth in *Schwarz*, it is outside the

⁶ *Keller v. State Bar of California*, 110 S.Ct. 2228 (1990), refused to consider the issue of whether injunctive relief would be an appropriate remedy because the California Supreme Court had not addressed the issue.

ambit of permissible bar lobbying activities. Thus, a petitioner may enjoin the bar from lobbying on that position. Under the circumstances of this case, where lobbying positions 6.a. through 6.h. neither fall under the five areas which clearly justify bar lobbying activities nor satisfy the three additional criteria by which to determine permissible lobbying activities, we enjoin The Florida Bar from lobbying on those positions henceforth from the date this opinion is final.

We therefore order that The Florida Bar refund Frankel a proportionate share of his bar dues applicable to the impermissible lobbying activities plus interest at the statutory rate from the date he paid those dues and enjoin the bar from the above-mentioned lobbying activities.

It is so ordered.

SHAW, C.J. and OVERTON, GRIMES, KOGAN and HARDING, JJ., concur. McDONALD, J., concurs specially with an opinion. BARKETT, J., concurs specially with an opinion, in which SHAW, C.J. and KOGAN, J., concur. NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

McDONALD, J., specially concurring.

I concur in the result reached by the majority opinion. I disagree only in the delineation of the scope of permissible lobbying activities of The Florida Bar. As I stated in my dissent in *The Florida Bar re Schwarz*, 552 So.2d 1094, 1098 (Fla. 1989), cert. denied, 111 S.Ct. 371 (1990), lobbying activities of The Florida Bar cannot extend beyond the following five designated areas:

(1) Questions concerning the regulation and discipline of attorneys;

(2) matters relating to the improvement of the functioning of the courts, judicial efficacy and efficiency;

(3) increasing the availability of legal services to society;

(4) regulation of attorneys' client trust accounts; and

(5) the education, ethics, competence, integrity and regulation as a body, of the legal profession.

Id. at 1095. Contrary to the majority opinion, I believe the decision of the United States Supreme Court in *Keller v. State Bar of California*, 110 S.Ct. 2278 (1990), not only buttresses, but indeed mandates, such a conclusion.

In all other aspects, I concur with the majority opinion.

BARKETT, J., specially concurring.

I am compelled to agree that The Florida Bar's lobbying efforts in this instance will not fit within the criteria of *The Florida Bar re Schwarz*, 552 So.2d 1094 (Fla. 1989), cert. denied, 111 S.Ct. 371 (1990), though I confess, like Cinderella's sisters, I have tried mightily to force the foot into the glass slipper. I am hopeful that the voluntary bar associations and the various sections of the Bar will take up the slack. Children, the poor, and especially poor children, have no constituency. It is only through the efforts of those who are already empowered that they can hope to compete with the interests able to represent themselves.

I would also encourage the Bar to reinitiate its lobbying efforts if it can more narrowly tailor those efforts within the *Schwarz* guidelines.

SHAW, C.J. and KOGAN, J., concur.

Original Proceeding – The Florida Bar

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